Vijeyan Kunjoo v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 41–135 OF 2007
SURAYA OTHMAN J
15 JUNE 2008

Criminal Procedure — Sentence — Appeal against sentence — First charge of drug possession and second charge of self administration or consumption of morphine — Whether sentence should run consecutively or concurrently — Whether two charges were connected as part of same transaction — Totality principle — Whether sentence excessive — Whether gap principle operated as mitigating factor

The accused in this case was charged with the first charge of drug possession and the second charge of self administration or consumption of morphine. At the magistrates' court the accused pleaded guilty to the two charges and was convicted and sentenced to 30 months imprisonment from the date of arrest and one year police supervision under s 295 of the Criminal Procedure Code in respect of the first charge and 16 months imprisonment and two years supervision by a rehabilitation officer under s 38B of the Dangerous Drugs Act 1952 in respect of the second charge. Both sentences were to run consecutively. The accused is appealing against those sentences. According to the accused the offences he was charged with were of the same nature or one and the same transaction and therefore the accused submitted that they warranted a concurrent rather than a consecutive term of imprisonment. The accused also submitted that the magistrate had erred in that she had taken into account convictions which were not in existence and imposed a sentence based on the wrong set of facts. In this regard the accused submitted that instead of four previous convictions for drugs the accused only had two and that too in 1989 and 1999, that is a gap of ten years and with the present case in 2007, another gap of eight years. The accused therefore contended that the gap principle or the fact that there had been at least a ten-year gap and another eight-year gap in the accused's criminal record, which showed that the accused had made an effort to rehabilitate himself, ought to have operated as a mitigating factor in his favour.

Held, preserving both terms of imprisonment but to run concurrently from the date of arrest; setting aside the one year supervision by the police but

maintaining the two year supervision by a rehabilitation officer:

(1) In order to make the several incidents parts of the same transaction there must be present the elements of proximity of time, proximity of place, continuity of action and finally continuity of purpose or design. In the present case, the drug found in the accused's right pocket was rather small, ie 1.33g of morphine, and the accused tested positive for morphine. From these facts it could be safely inferred that the morphine found in the accused's possession were for his own consumption and this was conclusively proven from the positive urine test. This showed that the two charges were connected in terms of time, place and the drugs found and consumed. Therefore all the four elements were present and the one or same transaction principle should apply (see paras 12, 15 & 16).

(2) In the present case, the offences of possession and consumption of drugs could also be deemed to be of the same nature that they could also be deemed as a one or same transaction offences. Therefore taking into account the totality principle the sentences imposed should be concurrent and not consecutive (see para 19–20).

(3) The facts of the present case showed that the accused had attempted to stay away from drugs. The gap of ten and then eight years were testimonies to his attempts and this fact should have operated as a mitigating factor rather than as an aggravating factor. However the magistrate had not rightly or fully considered the accused's record of previous convictions when she made her decision. It would appear that the magistrate had imposed an excessive sentence when she considered some factors, omitted others and introduced non-existence factors which therefore aggravated the sentence imposed (see para 26).

[Bahasa Malaysia summary

Tertuduh dalam kes ini telah dituduh dengan pertuduhan pertama iaitu memiliki dadah dan pertuduhan kedua iaitu pengambilan atau penggunaan sendiri morfin. Di mahkamah majistret tertuduh telah mengaku bersalah terhadap dua pertuduhan tersebut dan telah disabitkan dan dijatuhkan hukuman penjara 30 bulan dari tarikh tangkapan dan satu tahun pengawasan polis di bawah s 295 Kanun Prosedur Jenayah berkaitan pertuduhan pertama dan 16 bulan penjara dan dua tahun pengawasan oleh pegawai pemulihan di bawah s 38B Akta Dadah Berbahaya 1952 berkaitan pertuduhan kedua. Kedua-dua hukuman hendaklah dilaksanakan berturut-turut. Tertuduh merayu terhadap hukuman-hukuman tersebut. Menurut tertuduh kesalahan-kesalahan yang dia dituduhkan adalah sama sifatnya atau transaksi yang satu dan sama dan oleh itu tertuduh menghujahkan bahawa ini mewajarkan tempoh penjara yang serentak dan bukan berturut-turut.

A Tertuduh juga menghujahkan bahawa majistret terkhilaf apabila beliau mengambilkira sabitan-sabitan yang tidak wujud dan mengenakan hukuman berdasarkan set fakta yang salah. Sehubungan itu tertuduh menghujahkan bahawa tertuduh hanya mempunyai dua sabitan terdahulu dan bukan empat dan itupun dalam tahun 1989 dan 1999, iaitu lompang selama sepuluh
B tahun dan dengan kes ini dalam tahun 2007, satu lagi lompang selama lapan tahun. Tertuduh oleh itu menegaskan bahawa prinsip lompang atau fakta bahawa terdapat sekurang-kurangnya lompang selama sepuluh-tahun dan satu lagi lompang selama lapan-tahun dalam rekod jenayah tertuduh, yang menunjukkan tertuduh telah cuba memulihkan dirinya, patut berfungsi
C sebagai faktor mitigasi yang berpihak padanya.

Diputuskan, mengekalkan kedua-dua tempoh penjara untuk dilaksanakan
D serentak daripada tarikh tangkapan; mengetepikan pengawasan setahun oleh polis tetapi mengekalkan pengawasan dua tahun oleh pegawai pemulihan:

(1) Bagi tujuan membuat beberapa bahagian kejadian transaksi sama perlu wujud elemen-elemen kedekatan masa, kedekatan tempat, perlakuan berterusan dan akhirnya tujuan atau maksud yang berterusan. Dalam
E kes ini, dadah yang ditemui dalam poket kanan tertuduh agak kecil, iaitu 1.33g morfin, dan tertuduh telah diuji positif untuk morfin. Berdasarkan fakta berikut boleh dibuat inferens bahawa morfin yang ditemui dalam milikan tertuduh adalah untuk kegunaannya sendiri dan ini secara konklusifnya dibuktikan daripada ujian kencing yang positif.
F Ini menunjukkan bahawa kedua-dua pertuduhan tersebut adalah berkaitan mengikut masa, tempat dan dadah yang ditemui dan digunakan. Oleh itu kesemua empat elemen wujud dan prinsip transaksi yang satu atau sama patut terpakai (lihat perenggan 12,15 & 16).

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(2) Dalam kes ini, kesalahan-kesalahan milikan dan penggunaan dadah boleh juga dianggap bersifat sama dan boleh dianggap sebagai kesalahan-kesalahan transaksi yang satu atau sama. Oleh itu dengan mengambilkira keseluruhan prinsip hukuman-hukuman yang
H dikenakan patut dilaksanakan serentak dan bukan berturut-turut (lihat perenggan 19–20).

(3) Fakta kes ini menunjukkan bahawa tertuduh telah cuba menjauhkan diri daripada dadah. Lompang sepuluh tahun dan kemudian lapan tahun adalah pengakuan-pengakuan terhadap percubaannya dan fakta
I ini patut digunakan sebagai faktor mitigasi dan bukan sebagai faktor untuk memburukkan. Walau bagaimanapun, majistret tidak mempertimbangkan dengan wajar atau sepenuhnya rekod jenayah lampau tertuduh apabila beliau membuat keputusannya. Ia kelihatan bahawa majistret telah mengenakan hukuman yang melampau apabila

beliau mengambilkira beberapa faktor, meninggalkan yang lain dan memperkenalkan faktor-faktor yang tidak wujud yang telah menambahkan lagi hukuman yang dikenakan (lihat perenggan 26).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3342–3392.

Cases referred to

Abu Seman v PP [1982] 2 MLJ 338 (refd)
Amrita Lai Hazia & Ors v Emperor ILR 42 Cal 957 (refd)
Bachik Abdul Rahman v PP [2004] 2 MLJ 534 (refd)
Emperor v Ghulam wd Sarang & Ors [1908] Cr LJ 191 (refd)
PP v Loh Ang Sing [1965] 2 MLJ 129 (refd)
PP v Wong Kok Sein & Ors [1988] 2 MLJ 436 (refd)
R v Bibbings (1918) 13 Cr App R 205 (refd)
R v Faulkner (1972) 56 Cr App R 594 (refd)
R v Hockey [1980] Crim LR 594 (refd)
R v Nuttall (1908) 1 Cr App R 180 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (folld)
Soosainathan v PP [2001] 2 MLJ 377 (refd)
Zaidon Shariff v PP [1996] MLJU 159; [1996] 4 CLJ 441 (refd)

Legislation referred to

Criminal Procedure Code s 295
Dangerous Drugs Act 1952 ss 12(2), 12(3), 15(1)(a), 38B
Minor Offences Act 1955
Subordinate Courts Act 1948 s 102, 102(a)

Appellant in person.
Shamsul Sulaiman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Suraya Othman J:

[1] This was an appeal by the appellant who was sentenced for two separate charges under ss 12(2) and 15(1)(a) of the Dangerous Drugs Act 1952 (Act 234) ('DDA Act'). The appeal was against the excessive sentence and the learned magistrate's order that the term of imprisonment for the two charges were to run consecutively one after another. The two issues that required determination are:

(1) whether the offences in this appeal were of the same nature or one and the same transaction so as to have warranted a concurrent rather than a consecutive term of imprisonment; and

A (2) whether the magistrate had rightly considered the record of the previous convictions of the accused to come to her decision.

[2] The first amended charge read as follows:

B Bahawa kamu pada 24 Januari 2007 jam lebih kurang 12 tengah hari di Jalan Sarawak off Jalan Pudu, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur, telah ada dalam milikan kamu dadah berbahaya iaitu satu (1) paket plastik dan empat (4) tiub straw mengandungi heroin dan monoacetylmorphine seberat 1.33 gram (berat bersih) dan dengan itu kamu telah melakukan suatu C kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama.

[3] The second charge read as follows:

D Bahawa kamu pada 24 Januari 2007 jam lebih kurang 12 tengah hari di Jalan Sarawak off Jalan Pudu, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur, melalui ujian air kencing didapati kamu memasukkan dadah 'Morphine' ke dalam badan kamu sendiri, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952 (Pindaan Akta E A1167/2002) dan kamu boleh dihukum di bawah seksyen 15(1)(a) Akta yang sama.

[4] Therefore the first charge was for drug possession and the second, for self administration or consumption of morphine.

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[5] The appellant at the magistrate's court pleaded guilty to the offences and the learned magistrate accepted his plea, convicted and sentenced him to 30 months imprisonment from the date of arrest and one year police supervision under s 295 of the Criminal Procedure Code (FMS Cap 6) G ('CPC') in respect to the first amended charge and 16 months imprisonment and two years supervision by a rehabilitation officer under s 38B of the DDA Act in respect to the second charge. The sentences were to run consecutively one after another.

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[6] The appeal therefore was against the excessive sentence and the learned magistrate's order for the term of imprisonment to run consecutively.

(1) *Whether the offences in this appeal were of the same nature or one and the* I *same transaction so as to have warranted a concurrent rather than a consecutive term of imprisonment*

[7] In considering the first issue, the empowering provision regulating the powers of a magistrate court in meting out sentences over conviction of

several offences at one trial is provided under s 102 of the Subordinate Courts Act 1948 (Act 92) which read as follows:

> 102 Sentence in case of conviction for several offences at one trial.
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> When a person is convicted at one trial of any two or more distinct offences a Magistrates' Court may sentence him for those offences to the several punishments prescribed therefore which the court is competent to inflict, *the punishments when consisting of imprisonment to commence the one after the expiration of the other* in such order as the court may direct, *or to run concurrently* if the court shall so direct, but it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which is competent to inflict on conviction of one singly offence, to send the offender for trial before a higher court:
>
> Provided that —
>
> (a) *in no case shall the person be sentenced to periods of imprisonment amounting in the aggregate to more than twenty years*;
>
> (b) the aggregate punishment shall not exceed twice the amount of punishment which the court in the exercise of its ordinary jurisdiction is competent to inflict; and
>
> (c) when imprisonment is directed in default of payment of a fine or of costs or compensation ordered under the authority of any law for the time being in force, the imprisonment shall be consecutive to any other term or terms of imprisonment so directed and to any sentence of imprisonment otherwise imposed.

[8] Under s 102 of the Subordinate Court's Act 1948, a magistrate has the power to order the terms of imprisonment to run either consecutively or concurrently if an accused is charged with several offences and thereby convicted at one trial. This power is however limited to a maximum of twenty years under proviso (a) of s 102.

[9] What therefore is the guideline used by the courts in meting out either a consecutive or a concurrent sentence? From decided cases there are mainly two principles used namely the one transaction and the totality principle.

[10] The one transaction principle or also known as the same transaction principle has been explained in many cases. In *Amrita Lai Hazia & Ors v Emperor* ILR 42 Cal 957 the court held that there are four main tests which help in the legal determination as to what amounts to 'the same transaction'. They are proximity of time, unity or proximity of place, continuity of action

A and community of purpose or design. It is interesting to note that in establishing the four main tests, the Indian court also made the following observation:

> A comprehensive formula of universal application cannot be framed regarding the
B question whether two or more acts constitute the 'same transaction'; *the circumstances which must bear on its determination* in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

C **[11]** In the case *Emperor v Ghulam wd Sarang and ors* [1908] Cr LJ 191 it was held:

> The expression 'same transaction' used in ss 235 and 239 has not been defined in the code, but the illustrations to the sections make the intention of the Legislature,
D sufficiently clear. If a series of acts are so connected together by proximity of time, community of criminal intent, continuity of action and purpose, or by the relations of cause and effect, the accused may be charged with, and tried at one trial for every offence committed in such series of acts. If more persons than one are accused of different offences, committed in series of acts so connected, they may be tried together.
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[12] Referring to the case *Amrita Lai Hazra & Ors v Emperor*, there are actually no fixed rules as to the test in determining what makes offences distinct from one another. However in one local case, *Public Prosecutor v Loh*
F *Ang Sing* [1965] 2 MLJ 129 it was decided that:

> The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. However it is not necessary that all of them should be present
G to make the several incidents parts of the same transaction. The main test is that of unity of purpose or design. Unity of purpose or design and continuity of action are essential elements to link together different acts into one and the same transaction.

H **[13]** In *Bachik Abdul Rahman v Public Prosecutor* [2004] 2 CLJ 534 Augustine Paul JCA, as he then was, explained that the court would be guided by the one transaction rule:

> The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each
I case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem*

[1964] Crim LR 482; *R v Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design as explained earlier.

[14] See also *Abu Seman v Public Prosecutor* [1982] 2 MLJ 338; *Public Prosecutor v Wong Kok Sein & Ors* [1988] 2 MLJ 436; *R v Hockey* [1980] Crim LR 594 which expounded on the same principle.

[15] Therefore to make the several incidents parts of the same transaction, there must be present these essential elements namely proximity of time, proximity of place, continuity of action and finally continuity of purpose or design.

[16] In our present case, the appellant was charged with possession of 1.33g mixture of heroine and monoacetylmorphine and with consumption or self administration of the morphine drug into his body. This was evident from his urine test which proved positive for morphine. The question here is whether the two offences could be considered as falling into one or same transaction principle so as to warrant a concurrent sentence. The drug was found in the appellant's right pocket. The amount was rather small (1.33g) and he tested positive for morphine. From these facts it can be safely inferred that the drugs found in his possession were for his own consumption and in fact from the positive urine test, it conclusively proved so. The two charges also showed that they are so connected together in terms of time, place and the drugs found and consumed. Therefore all the four elements were present and the one or same transaction principle should apply.

[17] Let us now look at the totality principle. The totality principle imposes restrictions on the power of the courts to pass consecutive sentences. The court has to look at all the sentences imposed and see whether the sum total or the amount in their totality are excessive and if excessive, order them to run concurrently or partially concurrent and partially consecutive (see *R v Faulkner* (1972) 56 Cr App R 594).

[18] In explaining the totality principle, Augustine Paul in *Bachik Abdul Rahman* referred to the view of DA Thomas in *Principles of Sentencing* (2nd Ed) at pp 57–58:

The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the

A normal level of sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender a 'crushing sentence' not in keeping with his record and prospects.

In this regard reference is also made to *Emmins on Sentencing* (2nd Ed) p 151:

B It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.

C **[19]** In *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134 the Federal Court allowed a sentence to run concurrently if the offences or charges were of the same nature. In this case the sentence for possession of firearms and possession of ammunition were allowed to run concurrently because they were of the same nature but the sentence for discharging a firearm towards a D group of policemen were made consecutive.

[20] In our present case, the offences of possession and consumption of drugs can be deemed to be of the same nature as decided by *Sau Soo Kim*'s case; it can also be deemed as a one or same transaction offences and taking E into account the totality principle, the sentences imposed should be concurrent and not consecutive. In that light, I accordingly allow the appeal to set aside the consecutive sentence. The sentences therefore are to run concurrently.

F (2) *Whether the magistrate had rightly considered the record of the previous convictions of the accused to come to her decision*

[21] The second issue to be decided is whether the learned magistrate had G rightly considered the record of the previous convictions of the appellant in coming to her decision. From the grounds of her judgement, the learned magistrate noted that the appellant had four previous convictions for drugs commencing from 1989 to 2002, the present case being his fifth conviction under the same offence under the DDA Act. The learned magistrate stated H that the appellant was sentenced to two years imprisonment and RM2000 fine with a year of police supervision for the 2002 drug offence and as such concluded that the appellant was a habitual, unrepented drug offender and a deterrent sentence was paramount in the circumstances.

I **[22]** Upon close scrutiny of the previous conviction record (P7) I found no such conviction for drugs for the year 2002. Instead there were only two previous convictions for drugs under s 12(3) of the DDA Act for the years 1989 and 1999 where the appellant was sentenced to four months and six months imprisonment respectively. The other two convictions were for

running away from the Pusat Serenti Rehabilitation Centre where he was sentenced to eight months imprisonment and another conviction under the Minor Offences Act 1955 (Act 336) for possession of goods suspected to be stolen where he was sentenced to 12 months imprisonment.

[23] Therefore the learned magistrate had seriously erred when she took into account matters which were not in existence and imposed a sentence based on the wrong set of facts. Instead of four previous convictions for drugs, the appellant only had two and that also in 1989 and 1999, a gap often years and with the present case in 2007, another gap of eight years. In that light, the learned magistrate should have used the gap principle in imposing the appropriate sentence. In *Zaidon Shariff v Public Prosecutor* [1996] MLJU 159; [1996] 4 CLJ 441, His Lordship Augustine Paul J (as he then was) at p 447 state:

> In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour.

[24] Also refer to *R v Nuttall* (1908) 1 Cr App R 180 and *R v Bibbings* (1918) 13 Cr App R 205 for guidelines on the same principle.

[25] And in *Soosainathan v Public Prosecutor* [2001] 2 MLJ 377, it was held that the longer the gap between a previous conviction and the current offence, the greater the mitigatory effect.

[26] From the facts therefore it would have seem that the appellant did try to stay away from drugs but in the end it got the better of him. He did put in the effort; the gap of ten, then eight years are testimonies to his attempts and this fact should have operated as a mitigating rather than an aggravating factor. Therefore, I find that the learned magistrate had not rightly considered fully the appellant's record of previous conviction when she made her decision. She considered some, omitted others and introduced non-existence factors which aggravated her sentence. On this premise, I feel the sentence imposed by the learned magistrate is on the excessive side and I duly made this order.

[27] The 30 months imprisonment for the first amended offence and the 16 months imprisonment for the second offence are preserved but are to run concurrently from the date of arrest. The one year supervision by the police for the first amended offence under s 295 of the CPC is set aside but the two

A year supervision by a rehabilitation officer under s 38B of the DDA is maintained. One order of supervision is more than sufficient since to allow both would be overlapping and amounts to hardship for the appellant.

B **[28]** One order of supervision is more than sufficient since to allow both would be overlapping and amounts to hardship for the appellant.

Both terms of imprisonment preserved; one year supervision by the police set aside; two year supervision by a rehabilitation officer maintained.

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Reported by K Nesan

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